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March 27, 2007

Utah Attorney General's Opinion No. 07-002

The Honorable Jon M. Huntsman, Jr.
Governor of the State of Utah
Capitol Complex, East Building, Ste 220
Salt Lake City UT 84114

Re: Opinion on Education Vouchers

Dear Governor Huntsman:

This informal attorney general opinion is in response to your letter dated March 27, 2007, wherein you requested an opinion on the question: If a referendum petition on H.B. 148, Education Vouchers, is declared "sufficient" by the lieutenant governor as provided in Section 20A-7-307, what will be the impact on the Parent Choice in Education Program established in H.B. 148 and H.B. 174, Education Voucher Amendments, and the funding of that scholarship program as provided in S.B. 3, Appropriation Adjustments, H.B. 148 and H.B. 174.

My education specialists, Assistant Attorneys General Kristina Kindl and Bill Evans did the research and analysis contained in this opinion letter. I have reviewed their work and independently verified their citations and fully agree with their conclusions. This letter therefore constitutes the opinion of the Office of the Utah Attorney General and is based solely on the law and the facts with no consideration of any personal attitudes with regard to the voucher issue.

The Honorable Jon M. Huntsman, Jr.
Governor of the State of Utah
March 27, 2007
Page 2

It has been brought to my attention that the advocacy group Parents for Choice in Education retained attorney Clark Waddoups to send a letter (dated March 12, 2007) to Lt. Governor Herbert stating his opinion on this same issue. My opinion letter was researched and drafted prior to receipt or review, and completely independent, of Mr. Waddoups' letter.

OPINION SUMMARY

If the referendum petition on H.B. 148 is declared sufficient, it will not go into effect pursuant to Utah Code Annotated §20A-7-301(2) until such time as the matter can be submitted to the people in a special election. Nevertheless, **it is my opinion that H.B. 174 can stand alone and can be fully funded through S.B. 3, Item 135.**

1. Both bills are entitled "Education Voucher" bills (HB 148 "Education Vouchers"; HB 174 "Education Voucher Amendments").
2. Both bills create a "Parent Choice in Education" program (HB 148 sec. 804, "Parent Choice in Education is created..." HB 174 sec. 801, "This part is known as 'Parent Choice in Education'...").
3. HB 174 has a coordinating clause referring to HB 148.
4. The Legislative Fiscal Analyst's Fiscal Note for HB 174 (a fair indication of legislative intent and understanding at the time) clarified that it did not need a fiscal note because HB 148 (already passed and signed by the Governor at that time) was already funded fully for both bills as coordinated. However, he further clarified that even "in absence of the HB 148 or without a coordination clause, HB 174 would have had a fiscal impact of ... etc."
5. The Bill of Bills, SB 3, at item 135 funds the "Parent Choice in Education Act" for "School Vouchers". There only reference to HB 148 is in the final parenthetical phrase. Under the circumstances, this is not enough to suggest this was to the exclusion of 174, particularly with the legislative history and Fiscal Analyst's note.

DIFFERENCES BETWEEN H.B. 148 AND H.B. 174

House Bill 174 added the requirement that a scholarship recipient's parent assume full financial responsibility for the "costs associated with transportation" (Section 53A-1a-804(4)(b), line 75). It also clarifies that in assessing the achievement of students, the comparison should be based on the student's "academic" performance (Section 53A-1a-805(1)(f)(i)(A), line 96, adding the word "academic"). In order to be considered an eligible private school under this program, H.B. 174 added the mandate that the private school "employ or contract with teachers who have completed a criminal background check that complies with the requirements of Section 53A-3-410" (Section 53A-1a-805(g), lines 104-05). H.B. 174 added a prohibition that a school will not be eligible to enroll scholarship students if the school "encourages illegal conduct" (Section 53A-1a-805(3)(c), line 137). Under H.B. 174, a scholarship student's parental income must now be verified (Secs 53A-1a-806(2)(b)(I), line 170, and -808(1)(b), line 253). Finally, H.B. 174 moved the date of the legislative auditor review from the school year 2013-2014, up to the 2011-12 school year, and changed the appropriation of administrative monies to the State Board of Education from fiscal year 2006-07 to fiscal year 2007-08 (Section 53A-1a-811, lines 260-266).

If H.B. 148 is ultimately not approved by the voters, H.B. 174 would lack the following sections currently included in H.B. 148: "Title" (Section 53A-1a-801); "Findings and purpose" (Section 53A-1a-802); "Definitions" (Section 53A-1a-803); "Mitigation monies" (Section 53A-1a-807); "Enforcement and penalties" (Section 53A-1a-809); and "Limitation on regulation of private schools" (Section 53A-1a-810).

EFFECT OF REFERENDUM

The effect of a "sufficient" referendum petition on H.B. 148 on the Parent Choice in Education Program depends largely on whether H.B. 174 would be deemed sufficient to create the voucher program on its own. Voucher opponents may point to the title of H.B. 174, "Education Voucher Amendments" as a basis for arguing that H.B. 174 cannot stand independent of H.B. 148. However, while H.B. 174 is titled as amendments, the title is not controlling. H.B. 174 denotes that its provisions are superceding amendments, and it enacts entire sections which wholly cover the subject matter of the same numbered sections in H.B. 148. Consequently, H.B. 174 effectively repeals the prior sections of H.B. 148. See State v. Chicago Great Western Ry. Co., 222 Minn. 504, 513, 25 N.W.2d 294, 299 (Minn. 1946) ("A statute which expressly supersedes an earlier one is a repeal of it."); Longlois v. Longlois, 48 Ind. 60 (Ind. 1874); see also, Steamboat Co. v. The Collector, 85 U.S. 478, 490-91). Accordingly, a court will determine

whether H.B. 174 can stand alone by examining whether it provides enough guidance that the true intention of the Legislature and the fundamental purpose of the legislation can be carried out.

It is immaterial whether a referendum removes portions of a statute or whether particular legislative provisions are severed as unconstitutional, the analysis is the same: ascertain the necessity and probable object of the legislation, give such construction to the remaining language, and determine whether it is possible to give effect to the apparent intention of the Legislature based on the remaining provisions. Baird v. Burke County, 53 N.D. 140, 205 N.W. 17 (N.D. 1925); Gallivan v. Walker, 564 P.3d 1069, 1098, 455 Utah Adv. Rep. 3, 2002 UT 89, 87-88 (Utah 2002). In reviewing the statute as a whole and its operation without the “offending” portions, “[i]f the remainder of the statute is operable and still furthers the intended legislative purpose, the statute will be allowed to stand.” Gallivan, at 1098, 88 (quoting State v. Lopes, 1999 UT 24, 19, 980 P.2d 191 (Utah 1982)). The key is legislative intent “which generally is determined by whether the remaining portions of the act can stand alone and serve a legitimate legislative purpose.” Id. (quoting Stewart v. Pub. Serv. Comm’n, 885 P.2d 759, 779-80 (Utah 1994)). Importantly, courts will look at whether the Legislature would have passed the act without the portions that have been removed. Id. (quoting Union Trust Co. v. Simmons, 116 Utah 422, 429, 211 P.2d 190, 193 (1949)).

When H.B. 174 is analyzed using this framework, it is clear that the Legislature’s primary purpose of creating a voucher program can still be effectuated with the remaining sections of the act. However, there are a few sticking points. Most importantly, H.B. 174 references the State Board of Education’s duty to make rules to implement Section 53A-1a-807, the “Mitigation monies” section of H.B. 148 (See H.B. 174, Section 53A-1a-808(1)(c)). However, H.B. 174 makes no independent provision for such mitigation monies. The Legislature obviously intended these two bills to be coordinated and for mitigation monies to be provided to the public school system. The question becomes whether based on legislative history, the mitigation monies were such a fundamental part of the voucher program, that the act would have never been passed without them. There clearly is floor testimony from both the House and the Senate that will support that numerous legislators and senators voted for this bill only because of the existence of the mitigation monies, on the belief that these mitigation monies offset any harm to the public school coffers caused by the voucher program. In general terms, mitigation monies are not necessary to the viability of a voucher program (indeed mitigation monies are not part of other state’s constitutional voucher programs). But voucher opponents could raise the argument that the only reason the act passed in Utah was because of the provision of mitigation monies.

Additionally, the loss of the "Definitions" and "Limitation on regulation of private schools" sections will allow the State Board of Education to regulate private schools. This may raise constitutional entanglement issues for the program relative to the State Board's regulation of private parochial schools. Moreover, the loss of the "Findings and purpose" section will remove statutory language that the act was created for a "valid secular purpose" and is "neutral with respect to religion" (H.B. 148, Section 53A-1a-802(5)(a), (b)). Without this language the act may be more susceptible to an establishment clause challenge. However, these possible constitutional challenges to H.B. 174 will not doom the bill's ability to stand on its own in creating a voucher program.

In sum, although the absence in H.B. 174 of any provision for mitigation monies to the public schools is troubling, a court is likely to hold that H.B. 174 establishes a workable process and framework by which an educational voucher program can be established. Accordingly, the likely effect of a referendum petition on H.B. 148 will serve only to deprive the public school system of the mitigation monies provided for in H.B. 148, while at the same time giving the State Board of Education greater regulatory and oversight capability over private schools, including parochial schools. The loss of the legislative purpose and findings language may prove detrimental to the voucher program should it face a constitutional challenge in the courts, but will not effect H.B. 174's ability to independently establish a voucher program.

FUNDING OF VOUCHER PROGRAM THROUGH S.B. 3

Senate Bill 3 appropriates to the State Board of Education \$12,200,000 to implement the provisions of the Parent Choice in Education Act, through House Bill 148. (S.B. 3, Item 135) Accordingly, if the voters do not approve House Bill 148, the question arises as to whether the monies designated for the implementation of H.B. 148 can be utilized to implement the same program through H.B. 174.

Utah Code Annotated § 63-38-3(d) states that when money is appropriated by the Legislature, and subjected to a restriction, the money "may be used only for the purposes authorized." Insofar as S.B. 3 states that the money is to be used "to implement the provision of *Education Vouchers*", a credible argument can be made that the money can be utilized to fund H.B. 174, which is entitled "Education Voucher Amendments", given that the purpose of both bills is identical. A further bureaucratic option is provided by Utah Code Annotated § 63-38-3(e)(i). This section states that any "department, agency or institution for which money is appropriated" may request that the money appropriated for "one purpose or function" be

The Honorable Jon M. Huntsman, Jr.
Governor of the State of Utah
March 27, 2007
Page 6

transferred to another purpose or function "within an item of appropriation." In this instance, the Director of the Governor's Office of Planning and Budget Management shall require a new "work program" to be submitted for the fiscal year which sets forth the purpose and necessity for such a transfer.

After the work program is independently reviewed and analyzed, the governor may permit the transfer. Accordingly, the redirecting of the funding provided for in S.B. 3 is not an impossible hurdle in funding the voucher program. Of course a final option is for the Legislature to amend S.B. 3 and direct the appropriation monies to fund the program through H.B. 174.

The issue not addressed by redirecting the appropriated monies from H.B. 148 to H.B. 174, is that a portion of the initial \$12,200,000 appropriation was intended to fund mitigation monies to public schools. Clearly, this will need to be accounted for and addressed at some point, but the overriding issue of transferring the funding from H.B. 148 to H.B. 174 should be easily accomplished.

In addition, the Legislative Office of Legal Research and General Counsel has advised us that the Lead Legislative Fiscal Analyst, J. Ball, prepared the analysis on H.B. 174 after you had signed H.B. 148, and Mr. Ball determined that H.B. 174 needed no independent appropriation. Specifically, the Fiscal Note states:

Given the coordination clause in Section 7 of H.B. 174 and given that "Education Vouchers" (H.B. 148, 2007 General Session) has already passed and been signed by the Governor, H.B. 174 will not require appropriations in addition to those contained in H.B. 174 itself. Had H.B. 174 passed in absence of the H.B. 148 or without a coordination clause, H.B. 174 would have had an estimated fiscal impact of \$9.4 million in FY 2008 and \$12.5 million in FY 2009.

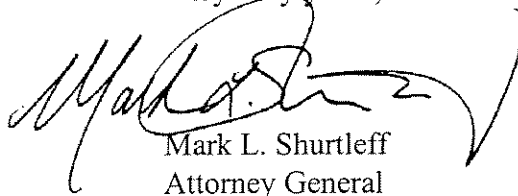
Mr. Ball's analysis would lend credence to the argument that given the explicit coordination between the two bills, the money should be transferred so as to fund the voucher program through H.B. 174.

In conclusion, it is my opinion that H.B. 174 can easily stand on its own, and can be fully funded according to the appropriations language. Please do not hesitate to contact me if you have

The Honorable Jon M. Huntsman, Jr.
Governor of the State of Utah
March 27, 2007
Page 7

any questions or concerns about our analysis and conclusions, or if we can be of assistance with regard to other issues related to the voucher issue

Very truly yours,

A handwritten signature in black ink, appearing to read 'Mark L. Shurtleff', with a large, sweeping flourish extending to the right.

Mark L. Shurtleff
Attorney General

MLS/hfp
cc: President John L. Valentine
Speaker Greg J. Curtis